In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1455

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-8) was entered on January 14, 1971, and a petition for rehearing was denied on February 10, 1971 (Pet. App. 9). The petition for a writ of certiorari was filed on March 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the fact of illegal electronic surveillance requires dismissal of all counts of an indictment although possible use of tainted evidence before the grand jury appears only as to one count of the indictment.

2. Whether petitioner was entitled to a new trial on the basis of alleged newly discovered evidence.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C., See 7201), provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

This is the second time this case has been before this Court. In 1967, Petitioner was convicted by a jury on Counts II and III of a three-count indictment. Those counts charged petitioner with having willfully attempted to evade and defeat his income tax for the years 1959 and 1960 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal

Revenue Code of 1954 (O.D.A. 23-45).[1] The government had elected not to proceed on the first count of the indictment after proceedings to suppress information held before trial made it appear that that count, charging a conspiracy to defraud, might have been tainted by illegal electronic surveillance. Petitioner was fined $5,000 on each count and sentenced to concurrent two-year prison terms (O.D.A. 15-16). The government's proof was by the net worth-expenditures method.

Petitioner's first appeal was predominantly concerned with assertions that his conviction had been tainted by the illegal surveillance. The court below affirmed his conviction and this Court denied review. *United States* v. *Balistrieri,* 403 F. 2d 472 (C.A. 7), certiorari denied, 394 U.S. 985. Petitioner then filed a petition for rehearing suggesting that there may have been additional illegal electronic eavesdropping of one or more of his conversations at premises different from those involved in the suppression proceedings preceding his trial. The United States stated in response that after investigation it had been determined that petitioner was "overheard during the course of an electronic surveillance of the premises at 645 North Michigan Avenue," and suggested that the case be remanded to the district court for further proceedings.

---

[1] The designation "O.D.A." refers to the original Defendant's Appendix in *Frank Peter Balistrieri* v. *United States,* No. 1070, October Term, 1968. The designation "O.G.A." refers to the original Government's Appendix in the same case. The designation "App." refers to the Appendix in the court below on the present appeal.

The Court adopted this suggestion, remanding to the district court for further proceedings in light of *Alderman* v. *United States,* 394 U.S. 165, and *Giordano* v. *United States,* 394 U.S. 310. 395 U.S. 710.

Petitioner then filed an independent motion for new trial in the district court on the ground of newly discovered evidence unrelated to the surveillance issues (App. 7-11). This motion for a new trial was denied (App. 22). Petitioner also filed a motion for the production of the documents relating to the electronic surveillance. The government then produced Government Paper No. 2, a six-page "Airtel" dated February 12, 1965, reflecting a conversation involving petitioner overheard as a result of electronic surveillance of 645 North Michigan Avenue on January 13, 1965. After appropriate hearings, the district court found (App. 21-22):

1. That the government conducted unlawful electronic surveillance of certain premises located at 645 North Michigan Avenue, Chicago, between October 2, 1964, and April 17, 1965.

2. That petitioner's conviction was not tainted by the use of evidence obtained as a result of the surveillance of January 13, 1965, when he was present and participated in a conversation at 645 North Michigan Avenue, and, further, that neither this conversation nor any fruits derived from it was proffered by the government during the trial or used by it in cross-examination of any witnesses proffered by petitioner.

3. That petitioner was present at 645 North Michigan

Avenue only once, *i.e.*, January 13, 1965, during the entire period of time the surveillance was in operation.

4. That the portion of the "Airtel" dated February 12, 1965, relating to petitioner's conversation of January 13, 1965, had been made available to him.

The court concluded "that the motion for new trial should be and the same hereby is denied; the Court further finds that no taint having permeated the conviction of defendant a new final judgment of conviction based on the existing record as supplemented by its further findings shall be entered." (App. 22.) Accordingly, a new judgment and commitment imposing the same penalties as those originally imposed was filed. The court of appeals affirmed.

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 13-14) that the government has not sustained its burden of showing that its trial evidence was free of taint. Petitioner concedes that the electronic surveillance at 645 North Michigan Avenue, which caused the remand of this case by this Court, "apparently does not bear upon any charge of tax evasion" (Pet. 15). His present argument is thus merely a restatement of the arguments which the court of appeals and this Court rejected on his first appeal. In affirming the petitioner's conviction on the first appeal in 1968, the court below stated (403 F.2d at 476-477):

> We hold that the evidence relating to Midwest was not "come at by exploitation" of the information obtained in the illegal searches and seizures,

but "by means sufficiently distinguishable to be purged of the primary taint."

We reach the same conclusion regarding the evidence allegedly obtained by the illegal eavesdropping. The Government met its burden in proving that its evidence was free from this taint by disclosing to the court and the defendant all information in the Government's possession, including summaries of the tapes which had been erased in the ordinary course of re-use, undestroyed tapes, and by making available the agents who participated in the eavesdropping. The district court ordered suppressed all the information obtained as the result of the electronic surveillances and the searches and seizures and all leads developed therefrom. Defendant contends, however, that the Government failed to meet its burden since it had destroyed the best evidence of what had been heard through erasure of the recordings on some of the tapes by their re-use. However, the Government tendered proof to the district court showing independent sources for the leads to each of the items of evidence introduced at trial. The trial judge displayed a high degree of prudence and deliberation in hearing extensive testimony from each side before concluding that the evidence offered by the Government was free from taint. We agree with his conclusion.

After its further review in connection with this second appeal by petitioner, the court below again came to the same conclusions (Pet. App. 3-5), citing *United*

States v. *Mirro,* 435 F. 2d 839, 841 (C.A. 7) (Pet. App. 4-5), and expressing the view that what petitioner termed the government's "piecemeal disclosures" of electronic surveillance actually "attests to the government's sincerity in making a full and complete disclosure rather than an attempt to frustrate * * *" petitioner's efforts to obtain complete discovery of unlawful eavesdropping (Pet. App. 4).

Since both courts below have twice satisfied themselves, by exhaustive review of the facts in the record, that petitioner's trial for tax evasion was not affected, directly or indirectly, by any illegally obtained evidence, and since the electronic surveillance which resulted in this Court's remand is now conceded to have no apparent bearing on the case, we submit that there is no occasion for further review.

2. Even assuming tainted evidence was used in obtaining the indictment on the dismissed conspiracy count (Count I), an assumption never proved true, petitioner was not entitled to have the substantive counts of the indictment dismissed. The conspiracy count itself could not have been dismissed on this basis, for a count of an indictment is not invalidated merely because tainted evidence has been presented to the grand jury in obtaining it. *Lawn* v. *United States,* 355 U.S. 339, 349-350; *Holt* v. *United States,* 218 U.S. 245, 247-248. *A fortiori,* one count of a multi-count indictment is unaffected by the use of tainted evidence in obtaining the indictment on some other count. As the court below stated in rejecting petitioner's identical contention on his first appeal (403 F. 2d at 477):

> Defendant's contention that the eavesdropping evidence used to obtain Count I of the indictment was prejudicial as to him affords no basis for reversal since he was never prosecuted on the first count. An illegal search and seizure "does not serve to immunize" the defendant from prosecution. *United States* v. *Ruffin*, 389 F. 2d 76, 79 (7th Cir. 1968); *United States* v. *Hoffman*, 385 F. 2d 501, 503-504 (7th Cir. 1967.

3. Petitioner's argument for a new trial on the ground of alleged newly discovered evidence presents no issue warranting further review. As the court of appeals found, the evidence was not newly discovered, and the suggestion that the prosecution suppressed evidence depends on a distortion of context and of the use to which the government put the relationship in issue (App. 6-8).

In particular, there can be no doubt that petitioner knew that his brother operated Tower Tavern, and the government never claimed that petitioner operated it. But petitioner had a substantial investment in the enterprise, and so it was reasonable to suggest it as one possible secondary source of unreported income. The quotation from the prosecutor's summation (Pet. 5) is taken out of context to make it appear that the government relied upon Tower Tavern as a major likely source of the net worth increases; but when the preceding paragraph is read (O.D.A. 227-228) it will be seen that the prosecutor was relying mainly upon the other taverns, Hotel Roosevelt and Ben-Kay, both of which petitioner personally operated during the years in ques-

tion. The contentions of newly discovered evidence regarding income tax returns filed by petitioner's sister-in-law, Jennie Alioto, and brother, Peter Balistrieri, at about the time the government's investigation of petitioner's tax matters began are equally frivolous.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

APRIL 1971.

☆ U.S. Government Printing Office: 1971—421-391/562